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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1978

**No. 28-1025**

PAUL HENRY PARKER,  
*Petitioner*

*v.*

UNITED STATES OF AMERICA,  
*Respondent*

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**PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT**

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Paul Henry Parker, by and through his undersigned attorney, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINION BELOW

The opinion of the court of appeals (App. A, *infra*,) is reported at 585 F.2d 462. The district court did not write a formal opinion. Its order denying a Motion to Dismiss the Indictment, from which the Appeal was taken, was entered February 1, 1978.

JURISDICTION

The judgment and opinion of the court of appeals was entered on October 26, 1978. The court of appeals denied Petitioner's Motion for a Rehearing and Reconsideration on November 22, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

### QUESTIONS PRESENTED

1. a) Whether, in support of a Motion to Dismiss an Indictment for reasons of double jeopardy, the Defendant need make a showing beyond a "non-frivolous" showing, in order to prevail.

b) Whether, in support of a Motion to Dismiss an Indictment for reasons of double jeopardy, the Defendant must bear the entire burden of proof, in order to prevail.

2. Whether Defendant-Petitioner made an adequate showing under either of the above-mentioned rules in the case at bar.

3. Whether the current Indictment of Defendant-Petitioner is barred for reasons of collateral estoppel.

### STATUTES INVOLVED

Sections 2, 371, 842(a)(3)(A), 844(i), 1503, 1510, and 1622 of Title 18, United States Code; Section 5861 of Title 26, United States Code; Sections 439(b)(c), and 501(c) of Title 29, United States Code; and the Fifth Amendment to the United States Constitution are set forth in Appendix B.

### STATEMENT

In 1975, a Federal Grand Jury sitting in Orlando, Florida, considered evidence presented to it regarding Petitioner Paul H. Parker, David W. Wingate and Ashley R. Burch, Jr. A three-count Indictment was returned against all three men. The Indictment charged each of them with violations of Title 18, U.S.C., sections 2, 371, 842, 842(a)(3)(A), 844, 844(i); Title 26, U.S.C., sections 5861, 5861(d)(e), and 5871.

Having entered their pleas of not guilty, Parker and Wingate proceeded to trial before a jury. The jury returned a verdict acquitting Wingate. Parker, however, was convicted of each

count and sentenced to concurrent terms of imprisonment of ten (10) years on Count I, ten (10) years on Count II, and five (5) years on Count III. A timely appeal of the conviction and sentence was taken to the United States Court of Appeals for the Fifth Circuit, which issued a decision affirming the trial court on December 15, 1978.

At all times material to the activities and incidents described in the 1975 Indictment (Indictment I), Petitioner Paul H. Parker was President of the Teamsters, Chauffers, Warehousemen and Helpers Union Local No. 385 at Orlando, Florida. Herman F. Witt was a business agent for the Local. David W. Wingate, Charles W. Bullard, Johnny M. Brown, Curtis Leroy Love, Kyle Duvall and Alto Oglesby were all employed in one capacity or another by the Local.

Parker, as President of the Local, and the other persons named above, were at that time engaged in an intense effort to organize and unionize several trucking companies and other business activities in the Central Florida area, particularly in Orange County, Florida.

In early 1971, one of the objects of these organizing efforts was Overland Hauling Company, located in Orange County, Florida. Count I of Indictment I charged Parker with aiding, abetting, counseling, commanding, inducing and procuring others "herein not named" to maliciously damage, by means of explosive, a building used in an activity affecting interstate commerce, located on the premises of Overland Hauling Company, Orange County, Florida, in violation of a Federal Statute.

Count II of Indictment I charged Parker with aiding, abetting, counseling, commanding, inducing and procuring others to knowingly possess a firearm, to-wit: a destructive device, in Orange County, Florida, in April of 1971, all in violation of Federal Statutes.

Count III of Indictment I charged Parker, Wingate and Burch with a "conspiracy violation." The Indictment alleged that from February 25, 1971, and continuously thereafter through April 16, 1971, in the Middle District of Florida and elsewhere, the three men conspired among themselves and with others to commit offenses against the United States "pertaining to the illicit, unlawful and malicious manufacture, transportation, transfer, possession and use of destructive devices and explosives..."

The Indictment stated the conspiracy had the following objectives: (a) to unlawfully receive and possess firearms which were not registered per Federal Statute; (b) to unlawfully transport or cause to be transported in interstate commerce, explosive materials without being a licensee or permittee under Federal Statute; (c) to unlawfully transfer a destructive device in violation of Federal law; (d) to maliciously damage and destroy, by means of an explosive bomb, buildings, motor vehicles, etc., used in interstate activities, in violation of Federal law. The Indictment stated that "*in furtherance of said conspiracy and in order to affect the objects thereof in an effort to subdue, overcome and destroy resistance to organized labor movement in Central Florida, the defendants and others committed among other overt acts, the following overt acts,*" at which point the Indictment recited twenty four (24) alleged overt acts. The acts set forth related to the procurement, assembly and use of destructive devices, the payment of money to various individuals in regard thereto, and various conversations relating thereto. The Indictment alleged that Parker participated in some of these conversations.

All of the overt acts set forth in the Indictment took place between February 25, 1971 and April 16, 1971, in and around the Orange County, Florida, area, with the exception that some of the acts took place in Miami, Florida, and some of them took place in the vicinity of Cheraw, South Carolina.

In early 1977, a Federal Grand Jury sitting in Orlando, Florida, returned yet another multi-count Indictment (Indictment II), naming Petitioner Parker and Thomas A. Larkin. Larkin was a Jacksonville, Florida, attorney who represented Parker's Local Union No. 385 in its organizing activities in the central and northeast parts of Florida.

Indictment II was in thirteen (13) counts, charging the Defendants with violating Title 18, U.S.C., sections 371, 1503, 1510, 1622, and 2; Title 29, U.S.C., sections 501(c), 439(b) and 439(c).

Count I of Indictment II charged both Parker and Larkin with a conspiracy under Title 18, U.S.C., section 371. The conspiracy was alleged to have had five (5) objectives: (1) the obstruction of communications from witnesses to special agents of the Bureau of Alcohol, Tobacco and Firearms, by intimidation, bribery, and threats of force; (2) obstruction of the due administration of justice before grand juries and the United States District Court during a series of bombing trials and grand jury investigations related thereto, specifically, *United States v. Love and Oglesby*, No. 71-33-Orl.-Cr., *United States v. Witt and Bullard*, No. 72-68-Orl.-Cr., and *United States v. Parker*, No. 76-62-Orl.-Cr.-Y; (3) subornation of perjury before grand juries in trial proceedings in the Middle District of Florida; (4) conversion and embezzlement of union monies in violation of Title 29, U.S.C., section 501(c); and (5) falsification of union records in violation of Title 29, U.S.C., section 439(c). The twelve other counts of Indictment II set forth substantially all of the overt acts alleged in support of the purported conspiracy, and alleged that those acts also constituted violations of specifically delineated Federal Statutes. Each of the defendants entered pleas of not guilty to each and every count of Indictment II.

The second Indictment alleged the purported conspiracy was in existence from February, 1971, until the date the Indictment was returned. All of the overt acts set forth in support of

the purported conspiracy, as well as the acts alleged in the twelve other counts, took place in and around Orange County, Florida.

Petitioner Parker moved to dismiss Indictment II on the grounds that the Indictment violated his constitutional right against double jeopardy, and violated the concept of "collateral estoppel." The motion was denied. After his Petition for Rehearing and Reconsideration was filed and granted, Petitioner Parker presented additional evidence not previously available to counsel for the court's consideration. Again, the relief sought in the Petition was denied.

The evidence presented to the trial court on the Motion to Dismiss included, among other things, statements given to agents of the U.S. Department of Treasury, Bureau of Alcohol, Tobacco and Firearms, which were obtained prior to the return of Indictment I and used by the Government in connection with its presentation before the first grand jury to obtain Indictment I. Transcripts of relevant portions of the statements are set forth in Appendix C. The transcripts include:

1. A statement given to the agents by Curtis Leroy Love regarding promises by Paul Parker and Herman F. Witt that if he (Love) were to be arrested, they would get him out of jail and provide him with legal counsel, and that in the event he (Love) went to prison, his family would be taken care of.

2. Testimony by Charles W. Bullard given to the Federal Grand Jury that returned Indictment I. The testimony related to promises made to Bullard of substantial sums of money from the Union, promises of legal assistance in case Bullard was arrested, payment of money for participation in a bombing, the falsification of Union expense vouchers to cover payment of the money, payment by Paul Parker of sums of money to Bullard's wife, and instructions to "stonewall it" regarding Union involvement.

3. Testimony of Herman F. Witt given as a prosecution witness in the case of *U.S.A. V. Paul Henry Parker*, 76-62-Orl.-Cr.-Y. On direct examination by the Government Witt testified regarding promises of payment of money and legal representation in case he was arrested. On cross-examination Witt testified regarding his payment of money to Curtis Leroy Love. On redirect examination by the Government, Witt testified that Parker had asked him to give false testimony at a deposition regarding involvement of Union officials in exchange for representation and help in getting out of prison if he were convicted of a crime.

4. Testimony by Herman F. Witt given before the Grand Jury that returned Indictment I. Witt testified regarding payments of money made by Parker to him in Parker's office, misuse of Union funds to pay for a trip to Miami to pick up dynamite, and falsification of Union expense vouchers to pay for dynamite purchased in South Carolina.

In further support of Petitioner Parker's claim of double jeopardy, counsel presented to the trial court excerpts from the Government's closing argument in *U.S.A. V. Parker*, 76-62-Orl.-Y. Transcripts of pertinent statements made by the Prosecutor as they relate to the charges presently pending against Petitioner are set forth in Appendix D. The statements include references to promises to persons involved in the bombings to provide legal representation and to help get them out of jail as long as they remained loyal to Parker; instructions from Parker that no one talk to him about the bombings in front of anyone else; claims that Parker had conducted, orchestrated, commanded, induced, and procured others to do the bombings and to insulate himself from any direct exposure; attempts by Parker to cover up his conduct, and to insulate himself "at every turn"; and payments to the wife of Curtis Leroy Love by Petitioner Parker.

Petitioner's counsel pointed out to the trial court that the statements referred to above and set forth in Appendices C and D refer to facts known and used by the Government in obtaining the first Indictment of Petitioner Parker and his conviction thereunder. Petitioner's counsel further contended that it was, indeed, apparent that, though the facts set forth in the statements referred to above formed the basis for the second Indictment, they formed an integral part of the conspiracy alleged in the first Indictment. Counsel argued that the Government had attempted to allege two separate conspiracies when, in fact, there was only one, and was thus placing Petitioner Parker in double jeopardy.

In its Order of February 1, 1978, the trial court stated that Petitioner Parker had not made it appear by a non-frivolous showing that the charge contained in the Indictment in this case (Indictment II) is the same as the charge contained in the first Indictment. The court therefore concluded the case at bar is not subject to being dismissed based upon either the constitutional claim of double jeopardy, or "collateral estoppel." The court made its conclusions despite the fact that the Government presented no evidence showing a distinction between the two indictments.

The Petitioner filed a timely Notice of Appeal of the lower court's Order denying his Motion to Dismiss, pursuant to 28 U.S.C. section 1291. Petitioner asserted to the court that under the cases of *United States v. Inmon*, 568 F.2d 326 (3rd Cir. 1977), and *United States v. Mallah*, 503 F.2d 971 (2nd Cir. 1974), he had made a sufficient showing of double jeopardy to the court below to require the Government to bear the burden of establishing separate conspiracies. Petitioner further contended that the Indictment must fail under the collateral estoppel doctrine of *Ashe v. Swenson*, 397 U.S. 436, 90 S.Ct. 1189, 25 L.Ed.2d 469 (1970).

The Court of Appeals rendered its decision October 26, 1978, affirming the decision of the trial court. (App. A) The court expressly abstained from adopting or approving the "burden shifting rule" and pointed out that the traditional rule in the Fifth Circuit is that the defendant "has the burden of proving double jeopardy." Further, the court rejected Petitioner's collateral estoppel argument, asserting that the collateral estoppel doctrine applies only when the defendant has prevailed in the prior proceeding.

The Petitioner filed a Petition for Rehearing and Reconsideration, which the court denied on November 22, 1978.

### REASONS FOR GRANTING THE WRIT

The Fifth Amendment to the Constitution of the United States guarantees, in part: "...nor shall any person subject for the same offense to be twice put in jeopardy of life or limb;..." That passage has been the subject of numerous opinions by this and other courts in attempts to describe its effect upon prosecutors' abilities to repeatedly try persons for the same offense or criminal episode. Nevertheless, increasing complexities of our society have continued to raise doubts about the meaning of the guarantee against double jeopardy, as the well as the proper means of implementing it. For example, the increased interest shown by investigative agencies in "white collar" crime has given rise to numerous disputes over the question of where one criminal episode ends and another begins.

The case at bar presents a similar question with regard to conspiracies. Specifically, this case manifests what could be described as general confusion in three major areas. The first is the question of how the protection against double jeopardy should be implemented. Having made the double jeopardy claim, must the defendant then prove it (and thereby possibly jeopardize other constitutional rights)? Or is it incumbent upon the Government to then come forward and show that it has the

right to prosecute the defendant for the questioned charge? As will be discussed below, the Court of Appeals for the Fifth Circuit maintains the former; at least two circuits maintain the latter.

The second general question posed by this case is how much of a showing is required of the defendant under either procedure. Indeed, inherent in this question is a consideration of the meaning of double jeopardy itself. For this underlying consideration would determine the nature and extent of either a showing by the defendant in support of his double jeopardy claim, or a showing by the Government in support of its right to prosecute.

The third major area of consideration presented by this case involves the limitations imposed by the Fifth Amendment, and its subsidiary doctrine of collateral estoppel, upon the prosecutor's discretion to fractionize single criminal episodes into separate indictments and thereby define, himself, a defendant's rights under the Double Jeopardy Clause of the Fifth Amendment.

1. As the court below pointed out in footnote 2 of its opinion, the traditional rule in the Fifth Circuit is that the burden of proving a double jeopardy claim rests upon the defendant. *Rothaus v. United States*, 319 F.2d 528 (5th Cir. 1963); *Reid v. United States*, 177 F.2d 743 (5th Cir. 1949). The Courts of Appeals for the Second and Third Circuits, however, have taken a more progressive stance. In those Circuits, the burden of proof shifts to the Government once the defendant makes a non-frivolous showing that the charge at hand places him in double jeopardy. For reasons set forth by those courts, themselves, and alluded to below, Petitioner asserts that this "burden shifting" rule is to be preferred.

The idea that the burden of proof to defeat a double jeopardy claim should shift to the Government was first offered

by the Second Circuit Court of Appeals in *United States v. Mallah*, 503 F.2d 971 (2nd Cir. 1974). There, in raising the double jeopardy issue, the defendant claimed the prosecution was charging him for two separate conspiracies when in fact there was only one. The defendant pointed out that the two alleged conspiracies occurred in the same general location, at the same general time, and involved some of the same co-conspirators. The court stated: "We think that these facts are sufficient to satisfy Appellant's burden of going forward, of putting his double jeopardy rights at issue. At this point, the burden shifts to the Government to rebut the presumption [that the Government was trying him twice for the same conspiracy]." 503 F.2d 971, 986.

The rule was adopted and expounded in greater detail by the Third Circuit in another conspiracy case, *United States v. Inmon*, 568 F.2d 326 (3rd Cir. 1977). Again, the issue was whether the Government was properly charging two conspiracies or simply fractionizing a single conspiracy. The court noted that, though it appeared well-settled that the defendant bears the burden of raising the double jeopardy issue, there was a dearth of authority as to the burden of proof once the issue was presented. The court noted that the only Circuit Court opinions it could find dealing with the burden of persuasion in such cases were *Reid v. United States*, 177 F.2d 743 (5th Cir. 1949), and *United States v. O'Dell*, 462 F.2d 224 (6th Cir. 1972), and that neither case offered any analysis or reason for holding that the defendant bears the burden of proving the unitary nature of the charges. "Moreover, neither considered the interaction between Fifth Amendment double jeopardy and self-incrimination privileges. . . ." 568 F.2d 326, 331.

"We conclude, as did the Second Circuit in *Mallah*, that, when a defendant makes a non-frivolous showing that an indictment charges the same offense as that for which he was formerly placed in jeopardy, the burden of establishing separate crimes - in this case separate conspiracies - is on the Govern-

ment. Besides the practical considerations respecting access to proof, to which we referred earlier, we also point to the obvious fact that it is the Government which has control over the drafting of indictments. Any burden imposed by the imprecision in the description of separate offenses should be born by it. To the extent that the *Reid* and *O'Dell* opinions suggest otherwise, we decline to follow them." 568 F.2d 326, 331, 332.

The court went on to address the level of proof required of the Government:

"As to the evidentiary burden, since the Fifth Amendment double jeopardy privilege is just that - a personal and waivable privilege - rather than an element of the crime, we think it inappropriate to require the Government to prove the separateness of the offenses beyond a reasonable doubt. It is possible to argue that, since we are dealing with a significant constitutional right and since the indictment process is controlled by the Government, we should hold the Government to a standard higher than a preponderance, perhaps to prove by clear and convincing evidence. But such a standard is not constitutionally required. Cf. *Lego v. Twomey*, 404 U.S. 477, 92 S.Ct. 619, 30 L.Ed.2d 618 (1972) (voluntariness of confession may be determined by preponderance of the evidence). Therefore, we hold that, when a defendant has made a non-frivolous showing that a second indictment is for the same offense for which he was formerly in jeopardy, the Government must prove by a preponderance of the evidence that there were in fact separate offenses before the defendant may be subjected to trial." 568 F.2d 326, 332.

As the court pointed out, the double jeopardy privilege is a personal and waivable privilege, rather than an element of the crime. This does not, however, diminish the prominence of the double jeopardy prohibition as an integral element in our society's concept of individual rights and freedoms. With this in mind, the practical considerations cited by the *Inmon* Court take on added importance. The prohibition against double jeopardy is not a qualified one; the Fifth Amendment is an

absolute bar against placing a citizen in jeopardy twice for the same offense. There are of course, recurring disputes over the definition of "double jeopardy." [See *United States v. Mallah*, *supra*; *United States v. Cioffi*, 487 F.2d 492, 496-498 (2nd Cir. 1973)]. Nevertheless, definitional disputes aside, the courts have consistently and meticulously enforced the provision.

In light of the great importance universally attached to the double jeopardy prohibition, the failure by the Fifth and other Circuits to offer any justification for thrusting the burden of proving double jeopardy upon the defendant is puzzling. As the *Inmon* Court pointed out, practicality and fairness demand the opposite result. Certainly, the prosecutor exercises great latitude and discretion in presenting evidence to a grand jury and seeking indictments from it. One of the few, but important, checks upon this prosecutorial discretion is the Fifth Amendment prohibition against double jeopardy. Just as the prosecutor must convince a grand jury that there is probable cause to believe a person committed a crime, the reasoning of the *Inmon* Court dictates he should have to convince the trial court he is not placing that person in double jeopardy, once the issue is properly raised. If, indeed, the double jeopardy claim is specious, that burden should be easily met. The *Inmon* Court would require the Government to rebut the presumption of double jeopardy only by a preponderance of the evidence. Certainly, much of this evidence would be the same as that the prosecutor would present to the jury, where it would have to withstand the more rigorous test of reasonable doubt. Additionally, the defendant is in a much inferior position regarding access to evidence. If the defendant can at least raise a serious question as to double jeopardy, the party most able to present the court with useful dispositive evidence in that regard is the Government.

It is also useful to note that *Mallah*, *Inmon*, and the case at bar are strikingly similar in that all three involve purported multiple conspiracies that overlap in time, location, and partici-

pants. Clearly, the court below in the case at bar had an excellent opportunity to reject or embrace the rule established in the Second and Third Circuits. Yet, the court expressly refused to do so. Again, the Fifth Circuit eschewed offering any analysis or reason for requiring the defendant to bear the burden of proof other than that that was the "traditional rule." Thus the court below juxtaposed what at least two circuits consider an important procedural safeguard against the Fifth Circuit's own "tradition," and failed to choose either.

Petitioner submits that such cavalier treatment hardly befits a constitutional guarantee of such import as the Double Jeopardy Clause of the Fifth Amendment.

2. The implication of the Court of Appeals' decision is that the Petitioner had to *prove* his claim of double jeopardy. The court measured the evidence offered the trial court by the Petitioner against the traditional test for determining whether double jeopardy exists formulated by this Court in *Blockburger v. United States*, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932):

"The applicable rule is that, where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of an additional fact which the other does not." 284 U.S. at 304, 52 S.Ct. at 182.

The court below then pointed out that the Fifth Circuit has interpreted the so-called "different evidence" test to require only that the second charge require proof of a fact and an element that the first charge does not. *United States v. Horsley*, 519 F.2d 1264 (5th Cir. 1975); *United States v. Hill*, 500 F.2d 733 (5th Cir. 1974). Again, the Fifth Circuit differs in this respect from at least two other circuits. For while the Fifth Circuit clings tenaciously to a restrictive view of the important personal protection against double jeopardy, other circuits have taken a more

progressive view. The Second Circuit Court of Appeals recognized the difficulty in applying the harsh "same evidence" test in *Mallah, supra*, stating in footnote 7 of its opinion:

"7. We recognize that in recent years the "same offense" has "been subject to serious criticism," see *United States v. Cioffi*, 47 F.2d 492, 496-498 (2nd Cir. 1973), with some favoring a looser "policy of fairness" standard which would require the Government to try to gather all offenses arising out of a single transaction or scheme and bar successive prosecutions of such offenses on grounds of double jeopardy, even though the evidence required to support a conviction for one offense might differ in some respects from that supporting another." 503 F.2d 971, 985 (citations omitted).

The court went on to discuss the difficulty in applying the test.

"The same evidence test is difficult to apply in determining whether one criminal conspiracy is the same as the second criminal conspiracy. The essence of the charge is the criminal agreement to merchandise narcotics. The same agreement may be established by different aggregations of proof. Appellant is hard pressed to show that he could have been convicted under the indictment below on the basis of the evidence introduced in *Pacelli I*, when the overt acts specified in *Pacelli I* were distinct from the overt acts charged below. But because there are no doubt many overt acts which the Government might have charged, a test measuring only overt acts provides no protection against carving one larger conspiracy into smaller separate agreements. In part for this reason, courts have been wary of applying a strict same evidence test in the context of criminal conspiracy. In *Short v. United States*, 91 F.2d 614, 624 (4th Cir. 1937), the court rejected reliance on the overt acts alleged, stating:

" 'Blanket charges of "continuing" conspiracy with named defendants and with "other persons to the grand jurors unknown" fulfill a useful purpose in the prosecution of crime, but they must not be used in such a way as to contravene constitutional guaranties. If the govern-

ment sees fit to send an indictment in this general form charging a continuing conspiracy for a period of time, it must do so with the understanding that upon conviction or acquittal further prosecution of that conspiracy during the period charged is barred, and that this result cannot be avoided by charging the conspiracy to have been formed in another district where overt acts in furtherance of it were committed, or by charging different overt acts as having been committed in furtherance of it, or by charging additional objects or the violation of additional statutes as within its purview, if in fact the second indictment involves substantially the same conspiracy as the first. . . . The constitutional provision against double jeopardy is a matter of substance and may not be thus nullified by the mere forms of criminal pleading.' "

See also, *United States v. Cohen*, 197 F.2d 26 (3d Cir. 1952); *Arnold v. United States*, 336 F.2d 347 (9th Cir. 1964), cert. denied, 380 U.S. 982, 85 S.Ct. 1348, 14 L.Ed.2d 275 (1965); *United States v. Palermo*, 410 F.2d 468 (7th Cir. 1969). " *United States v. Mallah*, 503 F.2d 971, 985 (2d Cir. 1974) (emphasis added).

The application of the *Mallah* passage to the case at bar is striking. In it, the Second Court of Appeals gives recognition to a fact of life the Fifth Circuit apparently refuses to consider: under the strict same evidence test, the Double Jeopardy Clause is highly vulnerable to the prosecutor's ability to employ legal and technical niceties in carving a single conspiracy or criminal episode into many, and harassing a defendant by trying him on each.

The Fifth Circuit's mechanical application of the "same evidence" test in the case at bar flies in the face of the post-*Blockburger* holding of this Court in *Braverman v. United States*, 317 U.S. 49, 63 S.Ct. 99, 87 L.Ed. 23 (1942):

"For when a single agreement to commit one or more substantive crimes is evidenced by an overt act, as the statute

requires, the precise nature and extent of the conspiracy must be determined by reference to the agreement which embraces and defines its objects. Whether the object of a single agreement is to commit one or many crimes, it is in either case that agreement which constitutes the conspiracy which the statute punishes. *The one agreement cannot be taken to be several agreements and hence several conspiracies because it envisages the violation of several statutes rather than one.*" 317 U.S. 99, 101-102 (1942) (emphasis added).

Again, the application of that holding to the case at bar could not be clearer. Yet, the Court of Appeals confidently dismissed the importance of *Braverman* because, as stated in Footnote 3 of the court's opinion, "since the defendant was charged with participation in two distinct conspiracies, rather than in a single conspiracy with several illegal ends, the result reached here is not affected by the rule of *Braverman v. United States*." Incredibly, the court seems to believe that if the government charges two conspiracies, then there *were* two conspiracies, and the ruling of this court in *Braverman* therefore means nothing. Petitioner submits that if this is indeed the law, prosecutors have been granted unbridled discretion to ignore facts and to view the Double Jeopardy Clause as a mere suggestion for the exercise of that discretion.

The facts, presented in Petitioner's evidence to the trial court and uncontraverted by the Government, are that the two purported conspiracies took place at the same time, in the same general location, and involved common participants. Further, the government knew of this so-called second conspiracy well in advance of the first indictment, presented evidence of it to the first grand jury, and resorted to evidence of it to obtain Petitioner Parker's conviction under the first indictment. The fact is that the conspiracy and underlying crimes charged in the second indictment were integral parts of the conspiracy and crimes charged under the first indictment. The fact is that there was only one conspiracy, albeit with several objectives.

All of this was shown by evidence presented to the trial court in support of Petitioner's Motion to Dismiss. Clearly, Petitioner proved his double jeopardy contention under the test set forth in *Blockburger*, as interpreted in *Braverman, supra*. Further, the evidence offered by Petitioner would certainly have satisfied his responsibility of making a non-frivolous showing sufficient to shift the burden of disproving double jeopardy to the Government.

By ignoring the holding of *Braverman, supra*, and refusing to recognize the evidentiary rule espoused by the Second and Third Circuits in *Mallah* and *Inmon, supra*, the Fifth Circuit Court of Appeals has placed itself at odds with this court, its sister circuit courts, and the Fifth Amendment to the Constitution of the United States.

3. In support of its application of the *Blockburger* test for determining the existence of double jeopardy, the Court of Appeals below cited several cases it contended "reaffirmed the vitality" of the test. The first such case cited by the court was *Brown v. Ohio*, 432 U.S. 161, 97 S.Ct. 2221, 53 L.Ed.2d 187 (1977). It is important to note, however, that *Brown v. Ohio* involved the application of the *Blockburger* test to the relationship between a lesser included offense and a greater offense. At the same time, this court recognized that other situations may call for other tests. Specifically, this Court stated in footnote 6 of the *Brown* opinion:

"6. The *Blockburger* test is not the only standard for determining whether successive prosecutions impermissibly involve the same offense. Even if two offenses are sufficiently different to permit the imposition of consecutive sentences, successive prosecutions will be barred in some circumstances where the second prosecution requires the relitigation of factual issues already resolved by the first. Thus in *Ashe v. Swenson*, 397 U.S. 436, 90 S.Ct. 1189, 25 L.Ed.2d 469 (1970), where an acquittal on a charge of robbing one of several participants in a poker game established that the accused was not present at the robbery, the

court held that principles of collateral estoppel embodied in the Double Jeopardy Clause barred prosecutions of the accused for robbing the other victims. And in *In re Nielsen*, 131 U.S. 176, 9 S.Ct. 672, 33 L.Ed. 118 (1889), the court held that a conviction of a Mormon on a charge of cohabiting with his two wives over a two-and-one-half year period barred a subsequent prosecution for adultery with one of them on the day following the end of that period.

In both cases, strict application of the *Blockburger* test would have permitted imposition of consecutive sentences had the charges been consolidated in a single proceeding. In *Ashe*, separate convictions of the robbery of each victim would have required proof in each case that a different individual had been robbed. See *Ebeling v. Morgan*, 237 U.S. 625, 35 S.Ct. 710, 59 L.Ed. 1151 (1915). In *Nielsen*, conviction for adultery required proof that the defendant had sexual intercourse with one woman while married to another, conviction for cohabitation required proof that the defendant lived with more than one woman at the same time. Nonetheless, the court in both cases held the separate offenses to be the "same" for purposes of protecting the accused from having to "run the gantlet" a second time." 97 S.Ct. 2221, 2226 (1977) (citations omitted).

Two important points may be gleaned from that passage. First, the application of the collateral estoppel doctrine to criminal cases substantially pre-dates this Court's holding in *Ashe v. Swenson*. Indeed, the primary significance of *Ashe* is that it for the first time perceived the collateral estoppel doctrine as an essential ingredient of the Fifth Amendment guarantee against double jeopardy. See the concurring and dissenting opinions to *Ashe v. Swenson*, 397 U.S. 436, 90 S.Ct. 1189, 25 L.Ed.2d 469 (1970). It cannot be maintained, therefore, that *Ashe* confines the scope of the collateral estoppel doctrine to the facts of that particular case. Yet, the Fifth Circuit would apparently interpret *Ashe* as holding the collateral estoppel doctrine applies only where the defendant has prevailed in the previous proceeding, as was the case in *Ashe*. Such is the implication of the Court of Appeals' statement that *Ashe* "is inapposite here, since

none of the factual issues involved in the second indictment was necessarily found for the defendant in the first trial, as defendant was convicted on all counts." (citation omitted).

This misstatement of the law calls forth the second major point arising from footnote 6 of the *Brown* opinion. Collateral estoppel, indeed, does not apply only where the defendant prevailed in the previous proceeding. As explained by this court in footnote 6 of its *Brown* opinion, the case of *In re Nielsen* involved a second trial on another charge *after the defendant had been convicted at the first trial*. Although the offenses charged would not have implicated the Double Jeopardy Clause under the *Blockburger* test, the court nonetheless held the offenses were the same in order to prevent the accused from having to "run the gantlet" a second time.

The reason behind the Court's decision in that case clearly indicates a strong constitutional policy basis for the collateral estoppel doctrine, in that prosecutors are to be discouraged from continually hauling a defendant into court on technically separate crimes and harassing him with evidence of the same criminal incident. The Fifth Circuit Court of Appeals would apparently provide this protection only to previously successful defendants, leaving the losers to fend for themselves.

The case at bar is an excellent example. Here, the Petitioner has shown by uncontraverted evidence presented to the trial court that there was a single conspiracy to commit bombings in furtherance of union organizing activities. Part of the plan, as set forth by the first indictment, was to recruit persons to do the bombings and to offer them inducements for their participation. These inducements included promises of cash payments, legal representation in case of arrest, support of the participants' families in case of conviction, and help in getting the participants out of prison in case of conviction. In exchange, those recruited were to perform the bombings and to deny, and otherwise cover up, any involvement by the union or its president,

Petitioner Paul H. Parker. Evidence available to the government, and used by the prosecutor to obtain the first indictment and first conviction, established that the plan called for union funds to finance the bombing conspiracy, and that a "cover up" was part of the original plan.

Clearly, what the government contends was the "first" conspiracy could not have proceeded without the "second." Conversely, without the "first" conspiracy, there was no purpose for the "second." There was, in fact, only one conspiracy. Yet the government has chosen to divide the single conspiracy into two, thereby allowing it to present its evidence of the conspiracy to the jury twice.

The fact that the charges in the two indictments may be technically different, and would therefore pass muster under the *Blockburger* test, is not dispositive of the propriety of the government's conduct. As this court noted in *Brown v. Ohio*, *supra*, the *Blockburger* test is insufficient to protect the defendant's rights under the Fifth Amendment Double Jeopardy Clause in every situation. Petitioner submits that the case at bar is just such a situation. The government, fully aware that the acts charged in the second indictment were integral parts of the crimes charged in the first indictment, and indeed having presented evidence of the crimes charged in the second indictment to the jurors in order to convict the Petitioner in his first trial, should be estopped from bringing Petitioner to trial on the current charges.

## CONCLUSION

As previously set forth in this Petition, Petitioner respectfully submits that the decision and opinion of the Court of Appeals in this case raises important questions regarding the rights of defendants under the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution. Petitioner therefore respectfully urges this Court to issue a Writ of Certiorari to the Circuit Court of Appeals for the Fifth Circuit so these issues may be more fully examined through briefs and argument, and so they may receive the benefit of this Court's judgment and final resolution.

Respectfully submitted,  
 LEVINE, FREEDMAN, HIRSCH  
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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Petition for Writ of Certiorari has been furnished, by mail, to Mark L. Horowitz, Assistant United States Attorney, for the Middle District of Florida, P.O. Box 2593, Orlando, Florida, 32802; Wade McCree, Jr., Solicitor General of the United States of America, Department of Justice, Washington, D.C.; and Edward W. Wadsworth, Clerk of the United States Court of Appeals for the Fifth Circuit, 600 Camp Street, New Orleans, Louisiana, 70130, this \_\_\_\_\_ day of December, 1978.

\_\_\_\_\_  
 ATTORNEY